STATE OF MICHIGAN

COURT OF APPEALS

ANGEL NIAMTU, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED February 10, 2011
v	No. 292667 Mecosta Circuit Court
JEFFREY BOUDAH and RICHARD ALAN BOUDAH, Defendants-Appellees/Cross-Appellants.	LC No. 08-018900-NI

Before: MURPHY, C.J., and METER and GLEICHER, JJ.

PER CURIAM.

Angel Niamtu sustained injuries when a vehicle driven by defendant Jeffrey Boudah struck her as she walked across a street. At the moment of impact, Niamtu was within a marked pedestrian crosswalk, and had almost reached the opposite curb. Niamtu insisted that she had not seen Boudah when she began to cross the street; Boudah claimed that he had not seen Niamtu until he could not avoid hitting her. The parties submitted their versions of the accident to a jury. At the close of Niamtu's proofs, the trial court directed a verdict in Boudah's favor, finding that no evidence supported any negligent conduct by Boudah. We reverse and remand.

I. BACKGROUND FACTS AND PROCEEDINGS

Shortly before 1:00 p.m. on a drizzly September 22, 2005, Niamtu stood at the corner of State and Morrison Streets in Big Rapids. Niamtu prepared to cross State Street to enter the Ferris State University campus, where a social sciences class awaited her. State Street runs in a north-south direction. At the State Street intersection with Morrison Avenue, an east-west street, State Street has four traffic lanes, two running north and two southbound. A median separates State Street's northbound and southbound lanes.

Niamtu recounted that before stepping from the corner of State and Morrison, she looked left and noticed a line of about five southbound cars in the lane closest to the curb. All of the cars in the curb lane displayed a blinker signal indicating that they intended to turn right onto Morrison. The lane closest to the median appeared empty. Niamtu described that she "walked out keeping an eye on the cars that were turning," reached the middle of the road, and "distinctly" remembered that no cars had entered the lane closest to the median. Niamtu maintained that she looked to her left while crossing State Street, continued to monitor for

approaching traffic, and emphasized that as she entered the second southbound lane, "[t]here was not a single car at all in that lane so I don't know where he came from, but he was not there when I was in the middle of the road. Nobody was; it was empty." The parties agree that Boudah's car struck Niamtu within the crosswalk, in the approximate center of the lane closest to the median.

Boudah, too, was on his way to a class at Ferris. He drove a 1990 Mercury Grand Marquis that he recalled pulling into the median lane of State Street from Fuller Avenue, a block north of Morrison.[1] Boudah admitted that State was a "very busy street," and acknowledged awareness that students frequently crossed State at the Morrison intersection to enter campus. Boudah asserted that he could see the State-Morrison intersection from his initial vantage point on Fuller. At trial, Boudah claimed that he never saw Niamtu leave the curb, and first spotted her when she was "[a]bout two-thirds of the way across the … right lane [of traffic]." But plaintiff's counsel impeached Boudah with his deposition testimony, in which he agreed that when he reached a distance approximately half way between Fuller and Morrison, 150 to 200 feet from the crosswalk, he noticed Niamtu step off the curb.[2] Boudah insisted that he had been driving within the posted speed limit of 35 miles per hour, and that on seeing Niamtu he immediately slammed on his brakes and turned his steering wheel to the right.

In Niamtu's case in chief, she also presented the videotaped testimony of Donald Rudny, a mechanical engineer and accident reconstruction expert retained by Boudah. Rudny explained that he investigated the accident by reviewing the police report, reading the deposition testimony, and inspecting the scene. According to Rudny, "the only … physical evidence" consisted of a newspaper article with an accompanying photograph. The newspaper photo, taken from the parking lot of a fast food restaurant, depicted Boudah's vehicle and Niamtu on the ground "in the position she was after the accident." From these "final rest positions of the pedestrian and of the automobile," Rudny extrapolated that Boudah's car had been travelling within a range of 28 to 34 miles per hour when Boudah first observed Niamtu. Rudny opined that Niamtu had created a "sudden emergency" by walking in Boudah's path, and that Boudah "did everything he could to avoid the … impact with the pedestrian." But on cross-examination, Rudny conceded that if Boudah had seen Niamtu step off the curb, as Boudah had admitted in his deposition, he would have avoided the impact by stepping on his brake at that time.

After Niamtu introduced the evidence supporting her negligence claim, Boudah moved for a directed verdict. Boudah argued that *DePriest v Kooiman*, 379 Mich 44; 149 NW2d 449 (1967), set forth "the rules … in a situation like this," and that under the circumstances Boudah owed Niamtu no duty of care. The trial court took the motion under advisement overnight. The next morning, the trial court rendered a lengthy bench opinion, which concluded:

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[1] Defendant Richard Boudah, Jeffrey Boudah's father, owned the Mercury Grand Marquis and allowed his son to drive it.

[2] In Boudah's deposition, he recalled seeing Niamtu when he was "probably even with" or "right before" Cedar Street. Cedar runs perpendicular to State, but intersects State only to the east. The maps and diagrams submitted by the parties reflect that Cedar joins State around halfway between Fuller and Morrison.

I have considered the deference again that must be shown to the non-moving party if there is [sic] any reasonable inferences that could be drawn from the evidence it would be appropriate for a jury to consider. So I'm not taking something from the jury's hands inappropriately, and the only thing, again, that I can see that was pointed to, that in any fashion would suggest that Mr. Boudah did not act reasonably, and therefore, may be negligent was the speed issue. And accepting what was said on cross-examination by Mr. Rudny, the best we've gotten to is 34 miles per hours, which is under the speed limit, and I'm not so sure that it's proper for me to say, even showing due deference, that the jury may be in a position to extrapolate besides something more than 34 miles per hour was the speed that Mr. Boudah traveled.

I think moreover, though, I am troubled and concerned if I send to the jury a case where Ms. Niamtu, who I thought was a credible and honest witness and has done, I think, a lot to make something of herself, she can't figure out what happened and I don't blame her, nor can any of the other witnesses, and she was hit by a vehicle that she never saw. I think that's pretty powerful that, at least for a portion of the time, she wasn't looking, or if she did look, and doesn't remember it because of the impact and the accident. I don't know what to do with that because I would be speculating and I wouldn't want the jury to do that either.

So what does this come down to; it comes down to that I believe it would be speculation on the part of the jury to determine that Mr. Boudah had acted negligently. I've accepted, as I should, much of what has been argued, and given all deference to the non-moving party, and I think Mr. Skupin did just as well as he could with Mr. Rudny to get some stuff on the record to try and suggest alternative scenarios, but the expert, Mr. Rudny, never wavered from the fact that there was an effort—an effort to stop. He didn't finally agree that there was any evidence to show that Mr. Boudah was speeding, and the remainder of the record gives no evidence that Mr. Boudah was speeding. I think to send the issue of speeding, and therefore, possible unreasonable behavior to the jury would be allowing them to speculate, and I don't think that's proper. But, moreover, and maybe more significantly, Ms. Niamtu's testimony clearly shows that she did not act fully reasonably, and maybe Ms. Niamtu did, and just doesn't remember because of the accident itself causing some memory issues. But, it's clear to me, in not seeing the vehicle as it was approaching that she was not looking and she has an obligation watch out for herself. And putting that in a light, folks, of what kind of highway this is; the state trunk line, in a crosswalk that's not marked, Mr. Boudah didn't have any expectations that he was required to stop or yield, although, of course he knew that that crosswalk was there, but there was no signed county, or state, or city obligation to slow down at this location if he didn't believe he needed to do so to avoid some kind of imminent contact. I find credible the description of the Emergency Doctrine, and when I say credible, I'm saying credible based on giving every bit of deference I can to the non-moving party.

> So it looks like there is nothing that could be pointed to, in my mind, to show that Mr. Boudah acted inappropriately And in Ms. Niamtu's case, there's nothing that I can see that showed she continued to observe as she should have as she crossed that second lane of traffic.
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> So even if Mr. Boudah was shown to be negligent, I think it would be speculative, and not proper to send to the jury in this case because I think on the evidence here, in my mind, it's unequivocal that Ms. Niamtu would be found to be more than 50 percent at fault, and therefore; on the non-economic damages claim, would be precluded from recovery on that basis.
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> So I am granting the motion for directed verdict for the reasons that I've stated.

II. ANALYSIS

We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In reviewing the trial court's ruling, this Court examines the evidence presented and all legitimate inferences arising therefrom in the light most favorable to the nonmoving party. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 201-202; 755 NW2d 686 (2008).

> In passing upon a motion for directed verdict, a trial judge must consider the evidence in plaintiff's favor *unqualified* by any conflicting evidence. The trial judge is not prohibited from considering evidence presented by a defense witness per se; rather, the judge may not consider evidence from *any* witness to the extent that it conflicts with evidence in plaintiff's favor. [*Locke v Pachtman*, 446 Mich 216, 226 n 8; 521 NW2d 786 (1994) (emphasis in original).]

These principles find their origin in *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 117 (1868), in which Justice Thomas Cooley explained:

> [W]e must look at the case as it appears from the plaintiff's own testimony, unqualified by any which was offered on the part of the defendants, and must concede to him any thing which he could fairly claim upon that evidence. He had a right to ask the jury to believe the case as he presented it; and, however improbable some portions of his testimony may appear to us, we can not say that the jury might not have given it full credence. It is for them, and not for the court to compare and weigh the evidence.

"Directed verdicts are not favored, especially in negligence actions." *Schutte v Celotex Corp*, 196 Mich App 135, 138; 492 NW2d 773 (1992).

Because our analysis involves the application of several aspects of the law governing negligence claims, we begin by reviewing the general legal principles relevant to this case. To establish a prima facie negligence claim, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached the duty, (3) the defendant's breach of duty proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Berryman v K*

Mart Corp, 193 Mich App 88, 91-92; 483 NW2d 642 (1992). "Negligence may be established by circumstantial evidence as well as by direct proof and they are equally competent, their relative convincing powers being for the jury to determine." *Spiers v Martin*, 336 Mich 613, 616; 58 NW2d 821 (1953). Circumstantial evidence and permissible inferences arising therefrom may suffice to prove negligence. *May v Parke, Davis & Co*, 142 Mich App 404, 417; 370 NW2d 371 (1985). In the vehicle collision context, a plaintiff's comparative fault does not bar the recovery of noneconomic damages unless she is determined to have been "more than 50% at fault." MCL 500.3135(2)(b). Additionally, a plaintiff may not recover if her negligence constitutes the sole proximate cause of her injuries. *DeGrave v Engle*, 328 Mich 565, 569-570; 44 NW2d 181 (1950).

The parties' disagreement centers on the nature of the duties owed by Boudah and Niamtu, which we now address in turn. Boudah's duty to Niamtu arises from the common law, while any violations of applicable administrative rules and regulations supply evidence of negligence. See *Beals v Walker*, 416 Mich 469, 481; 331 NW2d 700 (1982). "At the common law, unaided by statute or ordinance, it was said that the rights of pedestrians and motorists at crossings were equal and that neither had a superior right over the other." *Bartlett v Melzo*, 351 Mich 177, 181; 88 NW2d 518 (1958). The standard of care for both driver and pedestrian was that of "a reasonably prudent person under the same or similar circumstances." *Id*. "The *amount* of care exercised in attaining the due-care standard varies in proportion to the apparent risk." *Id*. (emphasis added). The Court additionally observed:

> Here the parties are in positions of gross inequality. The motorist has under his control an instrumentality capable of inflicting great bodily harm upon relatively slight impact, and at slight risk to himself. These are "circumstances" requiring the driver to exercise an extreme amount of care, for it is axiomatic that care must be exercised in direct proportion to one's capacity to injure. [*Id*. at 181.]

Thus, although both driver and pedestrian owe duties of reasonable care, the circumstances may justify heightened responsibilities. In *Johnson v Hughes*, 362 Mich 74, 77-78; 106 NW2d 223 (1960), the Supreme Court held that a jury could infer negligence when a driver hit a pedestrian walking in the middle of a street, on the basis of the driver's failure to maintain a reasonable and proper lookout.

Michigan's Administrative Code, in 1999 AC, R 28.1702, evidences recognition by the state police of the following applicable duty borne by a driver who encounters a pedestrian in a crosswalk:

> (1) When traffic-control signals are not in place or are not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is on the half of the roadway on which the vehicle is traveling or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger, but a pedestrian shall not suddenly leave a curb or other place of safety and walk or run into a path of a vehicle which is so close that it is impossible for the driver to yield.

Under Rule 28.1702, a driver who sees a pedestrian walking in a marked crosswalk must yield. Thus, the common law and the administrative code support that a driver must exercise reasonable care to avoid striking pedestrians in marked crosswalks.

"As a general rule, it can not be doubted that the question of negligence is a question of fact and not of law." *Detroit & Milwaukee R Co*, 17 Mich at 118. Here, some evidence substantiates that Niamtu occupied a marked crosswalk during the middle of the day, and had reached the middle of the second lane by the time Boudah's car struck her. Contrary to the trial court's view that "it would be speculation on the part of the jury to determine that Mr. Boudah had acted negligently," a reasonable jury could conclude that Boudah either saw or should have seen Niamtu in time to stop or otherwise avoid hitting her. The evidence agrees that nothing obstructed Boudah's view of the intersection. Because Boudah admitted that he saw the State-Morrison intersection when he turned onto State Street, and that he observed Niamtu step off the curb a block before he hit her, a jury could reasonably infer that Boudah negligently failed to maintain proper attention to the road before him.[3] Alternatively stated, a reasonable jury could conclude in light of the trial evidence that Boudah violated his duty to maintain a reasonable lookout for pedestrians crossing in a location where he should have expected to see them.

Pursuant to similar reasoning, we also reject the trial court's rulings that Niamtu was comparatively negligent as a matter of law, and that her negligence exceeded 50% of the total negligence. The doctrine of comparative fault demands that every actor exercise reasonable care. *Zaremba Equipment, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 33; 761 NW2d 151 (2008). "The general standard of care for purposes of comparative negligence, while differing in perspective, is theoretically indistinguishable from the applicable standard for determining liability in common-law negligence: the standard of conduct to which one must conform for his own protection is that of 'a reasonable (person) under like circumstances.'" *Lowe v Estate Motors Ltd*, 428 Mich 439, 455-456 (opinion by Riley, C.J.); 410 NW2d 706 (1987) (footnotes omitted). The standards for ascertaining a plaintiff's comparative negligence are indistinguishable from those applicable to the negligence of a defendant, and the determination of a plaintiff's negligence belongs to the jury "unless all reasonable minds could not differ." *Rodriguez v Solar of Michigan, Inc*, 191 Mich 483, 488; 478 NW2d 914 (1991).

"The question of a plaintiff's negligence for failing to use due care is a question for the jury unless no reasonable minds could differ or the determination involves some ascertainable public policy considerations." *Zaremba Equipment, Inc*, 280 Mich App at 33. Under the common law,

> [p]edestrians upon the public highway have a right to assume in the first instance the driver of an automobile will use ordinary care and caution for the protection of pedestrians, nevertheless the pedestrian must not rest content on such assumption, if there comes a time where he knows, or ought to know by the exercise of reasonable care, he is being placed in danger. He must take such care for his own safety as a reasonable, careful, prudent person would do under similar

[3] A statement offered against a party that is his or her own statement is admissible as substantive evidence. MRE 801(d)(2).

> circumstances. [*Pearce v Rodell*, 283 Mich 19, 37; 276 NW 883 (1937) (internal quotation omitted).]

Rule 28.1702(1) affords the right-of-way to a pedestrian crossing a roadway within a crosswalk, so long as the pedestrian does not "suddenly leave a curb or other place of safety and walk or run into a path of a vehicle which is so close that it is impossible for the driver to yield." No evidence tends to show that Niamtu ran across State Street or suddenly placed herself in the path of Boudah's car. We reiterate that comparative negligence is "a matter that should be decided by the finder of fact." *Poch v Anderson*, 229 Mich App 40, 51; 580 NW2d 456 (1998). Accordingly, a jury must decide whether Niamtu took "such care for [her] own safety as a reasonable, careful, prudent person would do under similar circumstances." *Pearce*, 283 Mich at 37.

Furthermore, to the extent that the trial court granted a directed verdict on the basis of *DePriest*, 379 Mich 44, we find that the trial court fundamentally misperceived the holding in that case. In *DePriest*, the Supreme Court quoted with approval the following language from a concurring opinion by Justice Talbot Smith in *Churukian v LaGest*, 357 Mich 173, 182-183; 97 NW2d 832 (1959):

> [D]ue care for … a driver does not demand that he slacken his speed or prepare to stop at successive street intersections in the anticipation that side-street drivers will contest his right-of-way. Not only would such action impede the flow of arterial traffic but it would be hazardous to both the driver and those following him. Due care, then, for the arterial driver includes his right to assume that he will be accorded the right-of-way. This assumption may be relied upon by him until he is aware, or as a reasonably prudent driver should be aware, that his right-of-way is being challenged.

The defendant in *DePriest* had the right of way on highway M-46, a "favored trunkline," *id*. at 46, and proceeded through an intersection on a yellow flashing light. *DePriest v Kooiman*, 2 Mich App 431, 432; 140 NW2d 538 (1966). The plaintiff stopped at a stop sign posted at the intersection, but then pulled out directly in front of the defendant's car. *Id*. This Court, 2 Mich App at 437-439, and the Supreme Court, 379 Mich at 49-50, held that the defendant owed no duty to avoid striking the plaintiff. The duties described in *DePriest* lack any relationship to those owed by a driver to a pedestrian walking in a marked crosswalk, or by the pedestrian occupying a crosswalk to oncoming traffic. The trial court incorrectly premised its directed verdict ruling on *DePriest*.

In *Moning v Alfono*, 400 Mich 425, 435-436; 254 NW2d 759 (1977), our Supreme Court took pains to emphasize that trial courts should rarely grant a directed verdict in a negligence case:

> The preference for jury resolution of the issue of negligence is not, however, simply an expedient reflecting the difficulty of stating a rule that will readily resolve all cases; rather, it is rooted in the belief that the jury's judgment of what is reasonable under the circumstances of a particular case is more likely

> than the judicial judgment to represent the community's judgment of how reasonable persons would conduct themselves.

"[T]he jury is free to credit or discredit any testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001). However, the law does not extend the same freedom to a trial court deciding a motion for directed verdict. In considering whether to direct a verdict, a trial court must construe the evidence strongly in favor of the nonmoving party. *American Airlines, Inc v Shell Oil Co, Inc*, 355 Mich 151, 157-158; 94 NW2d 214 (1959). The trial court may not rest a decision to grant a directed verdict on its belief in the credibility of an expert witness, like Rudny, or its determination that one party acted reasonably while another did not.[4] The reasonableness of the parties' conduct presents a quintessential jury question. And here, the evidence gave rise to at least three questions for the jury: (1) whether Boudah conducted himself as a reasonable driver under the circumstances, (2) whether Niamtu conducted herself as a reasonable pedestrian under the circumstances, and (3) if both behaved negligently, the percentage of fault for the accident attributable to each. None of those questions should have been removed from the jury's consideration.

We lastly note with respect to Boudah's argument on cross-appeal that the trial court erred by denying summary disposition in his favor, because substantially identical testimony supported Niamtu's response to Boudah's motion, the court correctly denied Boudah's motion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Niamtu may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

[4] Because this case must be tried a second time, we take this opportunity to emphasize that in considering a motion for directed verdict, the trial court must avoid accepting as true any testimony offered by Rudny that conflicts with evidence presented by Niamtu, or with legitimate inferences flowing from Niamtu's evidence. Rudny's *opinions* concerning the parties' legal duties must play no part in the trial court's consideration whether the evidence warrants a directed verdict. However, viewed in the light most favorable to Niamtu, the statistics and calculations recited by Rudny arguably create a jury question regarding Boudah's speed. But it remains within the province of a jury to accept or reject the veracity of any of these numbers.